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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 72

DOROTHY NIPPERT, APPELLANT,

vs.

CITY OF RICHMOND

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED MAY 14, 1945.

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 30, 1945.

[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 2901

DOROTHY NIPPERT, Plaintiff in Error,

versus

CITY OF RICHMOND, Defendant in Error

Petition for Writ of Error

To the Honorable Judges of the Supreme Court of Appeals:

Your petitioner, Dorothy Nippert, respectfully represents that she is aggrieved by a judgment in the Hustings Court of the City of Richmond, Virginia, entered against her on the 16th day of June, 1944.

A transcript of the record of the said cause is presented herewith, and as a part of this petition, from an inspection of which the following facts hereinafter assigned and complained of are made apparent:

Your petitioner was employed as a solicitor for the American Garment Company, which is owned and operated by John V. Rosser and has its office at 3617 12th Street, Northeast, Washington, D. C.

The American Garment Company employs solicitors who travel from city to city, throughout the country, obtaining orders for certain ladies' garments. A down payment is [fol. 2] required from the purchaser in an amount which is usually sufficient to pay the commission of the solicitor, and the order is then sent to Washington, D. C., and the garment is then sent by the American Garment Company to the purchaser through the United States mails, C. O. D. The solicitor at no time makes a delivery of the article, and the only compensation paid the solicitor is the amount received by way of commission.

Your petitioner, on January 20, 1944, was so soliciting orders in the City of Richmond, and on that day was arrested and charged with unlawfully engaging in Richmond in the business of a solicitor without having procured a City license assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937 (R., p. 1).

On the 22nd day of January, 1944, your petitioner was tried in the Police Court of the City of Richmond and fined $25.00 and costs and ordered to purchase a city license in accordance with the above cited ordinance, and your petitioner appealed to the Hustings Court, where the case came on for hearing on an agreed statement of fact (R., pp. 7-8) and found guilty as charged, and a fine of $5.00 and costs assessed against her, and a motion to set aside the judgment as contrary to the law and the evidence was denied and an exception noted.

While the record (R., pp. 5-6) contains the ordinances referred to at the trial, the only one that is material to this appeal is the following:

"Chapter 10, Section 23.—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors * * * $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933.)"

Assignment of Errors

1. The Court erred in holding that the City had the authority to pass the ordinance in question.

2. The Court erred in refusing to hold that the ordinance, insofar as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution.

3. The Court erred in holding that petitioner had violated the law in soliciting orders in interstate commerce without having procured a city license as a solicitor.

[fol. 3]

Question Presented

Whether the order, under which your petitioner was convicted, which required that she obtain a license for the privilege of soliciting orders in the City of Richmond for a foreign firm, was unconstitutional and a violation of the petitioner's rights under the Federal Constitution.

Argument

The record in this case clearly presents to this Court for its decision the question as to whether or not a person known as a solicitor or drummer, having no fixed place of

business, and soliciting orders for a foreign firm, can be required by the City of Richmond to pay $50.00 for a license for the privilege of soliciting such orders.

This particular question has been presented to this Court on numerous occasions and to the Supreme Court of the United States, and it has been held at all times that the City could not require such a license for the privilege of soliciting orders.

In the Case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, Robbins was found guilty of soliciting without having first obtained a license as required by the Statute in force in Shelby Taxing District, which contained, among other things, the following:

"All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months."

Robbins was soliciting orders for the firm of "Rose, Robbins & Co." of Cincinnati, and Robbins contended that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several states.

The Court, among other things, commencing at Page 496, stated as follows:

"But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and [fol. 4] its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of

importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

and then again, commencing on Page 497, is the following:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

and then again at Page 498 is the following:

"If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will un- [fol. 5] doubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the

disorder which prevailed under the Articles of Confederation.

"To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce."

This same question was again before the Supreme Court of the United States in the case of *Real Silk Hosiery Mills, Inc.*, v. *City of Portland*, 268 U. S. 325, in which case the facts disclose that the Real Silk Hosiery Mills, Inc., was an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis, Indiana, and selling it throughout the United States to consumers only. It employed two thousand representatives who solicit orders in most of the important cities and towns throughout the United States. The City of Portland passed an ordinance which required that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure a license and file a bond.

The appellant filed a bill in the United States District Court for Oregon challenging the ordinance and asking that its enforcement be restrained upon the ground, among others, that it interfered with and burdens interstate commerce and was repugnant to Article 1, Section 8 of the Federal Constitution. The Trial Court dismissed the bill.

The Court, at Page 335, said:

"Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497. * * *

" 'The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in [fol. 6] which the negotiation is made, is interstate commerce.' Manifestly, no license fee could have been required of appellant's solicitors if they had travelled at its expense and received their compensation by direct remittances from

it. And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189.

"The decree of the court below must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion."

The City of Richmond, in the lower Court, relied upon the case of *Dunston* v. *City of Norfolk*, 177 Va. 689, 15 S. E. (2nd) 86, but it is submitted that this case was based upon an entirely different ordinance and upon a very different statement of facts, for in that case Dunston had a fixed place of business, and the license referred to required only that a tax be paid, based upon the amount of the sales made by him or in the business during the calendar year ending with the 31st day of December next preceding. It did not require a license before orders were to be solicited. This Court in the Dunston case referred at length to the case of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 Sup. Ct. 388, and cited at length from the opinion in that case, and which reiterated its stand in the case of *Robbins* v. *Shelby County Taxing District, supra,* in the following language:

" 'It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694 (1 Inters. Com. Rep. 45) which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. (Cases cited) In all the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a [fol. 7] state, in some circumstances may, by taxation sup-

press or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed (cases cited), it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. (Cases cited.) It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing Dist.* (120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, 1 Inters. Com. Rep. 45), *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. (Cases cited) • • •" (309 U. S. 33, 60 S. Ct. 391, 84 L. Ed. 565, 128 A. L. R. 876."

And the Court then went on and distinguished between the Berwind-White case and the Dunston case in the following language:

"The decision in the Berwind-White Coal Mining Company case, *supra*, was made in connection with a sales tax based on the amount of the sales made. The sale contracts were entered into in New York City, and the delivery of the merchandise was made in that city. The instant case is in connection with a privilege tax—a tax measured by the amount of sales made by the taxpayer. The sales were negotiated in Norfolk and there consummated by a transfer of title or delivery of possession. Both the Berwind-White Coal Mining Company and Dunston had a fixed place of business in their respective cities. A non-discriminatory privilege tax has no different effect upon interstate commerce than a sales tax or a use tax. Each adds to the ultimate cost to the purchaser. That the tax is paid in one instance by the purchaser, and in the other by the vendor does not affect the interstate or intrastate phase of the transaction."

The counsel for the City of Richmond also relied upon the case of *Christian Corporation* v. *The Commonwealth of Virginia and the City of Richmond*, tried in the Circuit Court of the City of Richmond, and in which case a writ of error was denied by this Court on the 8th day of October, 1941.

Thereafter a petition for a writ of *certiorari* to the Supreme Court of the United States was filed and denied by that Court but it is contended that the Christian Corporation case may be easily distinguished from the present case.

The Christian Corporation was a Virginia corporation with its principal office and place of business in the City of Rich-
[fol. 8] mond, and it was required to pay a tax on the business of the preceding year, even though its income was from business obtained though interstate commerce, and the City of Richmond and the Commonwealth of Virginia relied upon the Dunston case to support its right to assess such taxes, and no question was raised in either case covering the requirement that a person obtain a license prior to soliciting orders in interstate commerce, and the City of Richmond and the Commonwealth of Virginia in their brief, which was filed in the Christian Corporation case in opposition to the petition for a writ of *certiorari*, on Page 7 stated as follows:

"But a State license as a commission merchant is only required where such merchant has established a definite place of business, section 131 of the Tax Code of Virginia (Acts of Assembly 1928, p. 97) providing that 'every license granting authority to engage in * * * any business * * * shall designate the place of such business * * * at some specified house or other definite place within the county or city * * *.' There is no State license required of an itinerant solicitor of orders in a city or town with no place of business therein (such as a drummer) and consequently section 296 of the Tax Code does not afford any authority for the assessment of a local license in such a case."

Your petitioner in this case is in a similar position with the petitioner in the case of *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 63 Sup. Ct. Rep. 870, and the Court in that case, at page 112, stated as follows:

"It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44, 45, 54 S. Ct. 599, 601, 78 L. Ed. 1109, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so

costly as to deprive it of the resources necessary for its maintenance. • • •

"It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may [fol. 9] not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56-58, 60 S. Ct. 388, 397, 398, 84 L. Ed. 565, 128 A. L. R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. Id., 309 U. S., at page 47, 60 S. Ct., at page 392, 84 L. Ed. 565, 128 A. L. R. 876 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."

Your petitioner, under the circumstances, does not feel that she should be required to pay $50.00 for a license for the privilege of soliciting orders in the City of Richmond for a foreign firm, and it is prayed that a writ of error may be awarded her to the said judgment and that the same may be reviewed, reversed and remanded to the Hustings Court of the City of Richmond, with proper directions.

It is the desire of your petitioner to state orally the reasons for reviewing this decision, and, in the event a writ of error be awarded, to adopt this petition as her brief. A copy of this petition being forwarded by Registered Mail to Henry R. Miller, Jr., Esquire, Assistant City Attorney, 402 City Hall, Richmond, Virginia, this 17th day of July, 1944.

Respectfully submitted, Dorothy Nippert, Petitioner,
by Cornelius H. Doherty, Attorney.

Cornelius H. Doherty, 4719 North Rock Spring Road, Arlington, Virginia, Attorney for Petitioner.

[fol. 10] I, the undersigned counsel, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion there is an error apparent on the face of the record of the judgment in this case, for which the same should be reviewed and reversed.

Cornelius H. Doherty, Attorney for Petitioner.

Received July 18, 1944.

M. B. Watts, Clerk.

ORDER GRANTING WRIT OF ERROR

Writ of error granted. Bond $300.00.

8-23-44. George L. Browning.

Received August 23, 1944.

M. B. W.

In the Hustings Court of the City of Richmond

City of Richmond

v.

Dorothy Nippert

Before Hon. John L. Ingram, Judge, Richmond, Virginia, June 16, 1944

WARRANT

City of Richmond, to-wit:

To all or any of the Police Officers of the City of Richmond:

Whereas, R. L. Beasley and H. H. Meeks have this day made complaint and information on oath before me, Carleton E. Jewett, Substitute Police Justice of said city, that on the 20th day of January, 1944, at said City of Richmond Dorothy Nippert did unlawfully engage in Richmond in the business of a solicitor without having procured a City [fol. 11] license assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937.

These are, therefore, in the name of the City of Richmond, to command you forthwith to apprehend and bring

before me, or some other Justice of the Peace of the said city, the body of the said Dorothy Nippert to answer said complaint, and to be further dealt with according to law.

And moreover, upon the arrest of the said Dorothy Nippert by virtue of this warrant, I command you in the name of the City of Richmond to summon R. L. Beasley, H. H. Meeks, Mr. Perriott c/o Miller & Rhoads, Inc. and C. V. Werne, clo Better Business Bureau to appear at the Police Justice's Court, as witnesses to testify in behalf of the City of Richmond against the said Dorothy Nippert on the 22nd day of January, 1944. And have then and there this warrant, with your return thereon.

Given under my hand and seal this 22nd day of January, 1944.

Carleton E. Jewett, Substitute Police Justice. (Seal.)

A copy teste:
L. A. Schumann, Deputy Clerk.

(On Back)

In the Police Court

1/22/44 Richmond, Va.

Fine $25.00 and cost and ordered to purchase City License, as provided by Section 23, Chapter 10, Richmond City Code of 1937. Appeal noted.

Carleton E. Jewett, Sub. Police Justice, Richmond, Virginia.

A copy teste:
L. A. Schumann, Deputy Clerk.

[fol. 12]

City of Richmond

v.

Dorothy Nippert

Bench Warrant

Executed by arresting the within-named

And summoning the within-named witnesses

In Police Justice's Court of City of Richmond

JUDGMENT—January 22, 1944

This is to certify that the within named Dorothy Nippert, was this day tried by me for the charge set forth within

this warrant, and that upon said trial she, the said Dorothy Nippert was duly convicted of the within charge and ordered to purchase city license to pay a fine of $25.00 dollars and costs dollars, from which sentence, she the said Dorothy Nippert appeals to the next term of Hustings Court.

Given under my hand this 22 day of Jan., 1944.

C. E. Jewett, Police Justice.

A copy teste:

L. A. Schumann, Deputy Clerk.

In the Hustings Court of the City of Richmond

City of Richmond

v.

Dorothy Nippert, Dft.

JUDGMENT ON APPEAL—June 16, 1944

[fol. 13] The said defendant this day appeared and was set to the bar in the custody of the Sergeant of this City, and being arraigned pleaded not guilty of unlawfully engaging in Richmond in the business of a solicitor without having procured a City license assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937, as charged. And with the consent of the accused, given in person, and the concurrence of the Court and the Attorney for the City of Richmond, the Court proceeded to hear and determine this case without a jury. And having heard the evidence doth find the said defendant guilty as charged and assess her fine at Five Dollars.

Whereupon it is considered by the Court that the said Dorothy Nippert pay and satisfy a fine of Five Dollars and costs. And thereupon the said defendant, by counsel, moved the Court to set the said judgment aside as contrary to the law and the evidence, which motion the Court doth overrule, and the defendant excepts, and time is allowed her, not to exceed sixty days from this day, in which to file her bills of exceptions. And thereupon, on the defendant's motion, the Court doth suspend the execution of said judgment until the 6th day of November, 1944, in order that the said defendant may apply to the Supreme Court of Appeals of Virginia for a writ of error and *sup-*

ersedeas, and the said defendant is recognized to make her personal appearance in this Court on the said 6th day of November, 1944.

A copy teste:

L. A. Schumann, Deputy Clerk.

Virginia:

In the Hustings Court of the City of Richmond

And now at this day, to-wit: At a like Hustings Court, held in the Courthouse in the City Hall of said City on the 11th day of July, 1944, being the same day and year first hereinbefore written, the following order was entered, to-wit:

City of Richmond

v.

Dorothy Nippert, Dft.

[fol. 14] The transcript of the testimony and ordinances in the above cause, having been received by the Court on the 11th day of July, 1944, was this day signed and sealed by the Court and delivered to the Clerk of this Court, and is hereby made a part of the record in this cause.

A copy teste:

L. A. Schumann, Deputy Clerk.

In the Hustings Court of the City of Richmond

City of Richmond

vs.

Dorothy Nippert, Dft.

ORDINANCES AND FACTS ADDUCED AT TRIAL

Chapter 10, Section 4.—There shall be levied and collected for the calendar year 1931 and each calendar year thereafter, the following license taxes, to-wit: (December 24, 1930.)

Chapter 10. Section 23.—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors ..... $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of

Public Safety required before license will be issued. (December 15, 1933.)

Chapter 10, Section 166½.—Permits of Director of Public Safety Required for Certain Licenses.—(a) Every person, firm and corporation desiring a license under sections 14, 16, 23, 94, 120 and 143, of this chapter shall first apply to the Director of Public Safety for a permit on behalf of said individual, firm or corporation, as the case may be, to conduct the business which is desired to be conducted and shall produce to that Director evidence of the good character of the individual, the members of the firm, or the chief officers of the corporation, as the case may be, and it shall thereupon be the duty of the Director of Public Safety to make a reasonable investigation of the character of said individual, each of the members of the firm, or each of the chief officers of the corporation, as the case may be, and if he be satisfied that the individual, the mem-
[fol. 15] bers of the firm or the principal officers of the Corporation, as the case may be, be of good moral character and a person or persons fit to engage in the proposed business, he shall issue the permit. The form of the application for such permit and the form of the permit itself shall be prepared and furnished by the Director of Public Safety.

(b) Every person, firm and corporation desiring a license under sections 25, 26, 29, 30, 31, 32, 33, 34, 35, 37, 38, 40 or 42 shall apply to the Director of Public Safety for a permit to conduct the desired business and furnish evidence to that Director that the house, building, structure, or room in which the proposed business is to be conducted is a suitable place to conduct said business and has facilities for escape in case of fire and is sufficiently strong and safe and otherwise complies with the building code of the City of Richmond and it shall thereupon be the duty of the Director of Public Safety to make a reasonable investigation of the facts in connection with such application and to cause the building inspector of the City of Richmond to make an inspection and report as to the condition of the premises and the compliance thereof with the building code of the City of Richmond. If the Director of Public Safety be satisfied that the premises are strong and safe and otherwise comply with the building code he shall issue the desired permit. The form of application for such permit and the form

of the permit itself shall be prepared and furnished by the Director of Public Safety. (January 5, 1944).

A copy teste:

L. A. Schumann, Deputy Clerk.

The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from City to City throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C. O. D. for the balance to the purchaser. The solicitors at no time make a delivery of the article.

[fol. 16] The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not therefore procured a City revenue license from the City of Richmond.

JUDGE'S CERTIFICATE

I, John L. Ingram, Judge of the Hustings Court of the City of Richmond, Virginia, who presided over the trial of the case of City of Richmond *v.* Dorothy Nippert, on June 16, 1944, do certify that the testimony included in the foregoing transcript was before me for consideration in the trial of said case.

And I further certify that the Attorney for the City of Richmond was given reasonable notice, in writing, of the time and place at which this certificate was to be tendered.

Given under my hand this 11th day of July, 1944.

John L. Ingram, Judge of the Hustings Court of the City of Richmond, Virginia.

A copy teste:

L. A. Schumann, Deputy Clerk.

[fol. 17] I, L. A. Schumann, Deputy Clerk of the Hustings Court of the City of Richmond, Virginia, do hereby certify that the foregoing transcript, duly authenticated and certified by the Judge of said Court, was delivered to me on the 11th day of July, 1944.

Given under my hand this 11th day of July, 1944.

L. A. Schumann, Deputy Clerk, Hustings Court of the City of Richmond.

I, L. A. Schumann, Deputy Clerk of the Hustings Court of the City of Richmond, Virginia, do certify that the foregoing is a true and correct transcript of the record in the case of City of Richmond *v.* Dorothy Nippert; and I do further certify that counsel of record for the City of Richmond had due notice of the intention of counsel for the defendant to apply for the said transcript before the same was made out and tendered.

Given under my hand this 11th day of July, 1944.

L. A. Schumann, Deputy Clerk, Hustings Court of the City of Richmond.

A Copy—Teste:

M. B. Watts, C. C.

[fol. 18] IN SUPREME COURT OF APPEALS OF VIRGINIA

Present: Campbell, C. J., Holt, Hudgins, Browning, Eggleston and Spratley, JJ.

Record No. 2901

DOROTHY NIPPERT

v.

CITY OF RICHMOND

From the Hustings Court of the City of Richmond, John H. Ingram, Judge

OPINION BY CHIEF JUSTICE PRESTON W. CAMPBELL—March 5, 1945

The litigants agree that in the case at bar the principal question is whether the ordinance of the city of Richmond, under which the defendant, Dorothy Nippert, was convicted, is violative of the Federal Constitution. That ordinance reads:

"*Chapter 10, Section 23.*—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors * * * $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933)"

The defendant was arraigned in the Hustings Court of the city of Richmond upon a warrant emanating from the police justice's court, which charged "that on the 20th day of January, 1944, at said city of Richmond Dorothy [fol. 19] Nippert did unlawfully engage in Richmond in a business of a solicitor without having procured a city license assessable under section 23 of chapter 10 of the Richmond City Code of 1937."

Defendant, upon her arraignment, pleaded not guilty, and with her consent and the concurrence of the city attorney, the court proceeded to hear and determine the case without a jury. At the conclusion of the evidence, the court found the defendant guilty as charged in the warrant and assessed her fine at five dollars.

The facts certified by the trial judge are as follows:

"The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from city to city throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C. O. D. for the balance [fol. 20] to the purchaser. The solicitors at no time make a delivery of the article.

"The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

"The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not *therefore* procured a City revenue license from the City of Richmond."

[fol. 21] The dominant assignment of error is:

"The Court erred in refusing to hold that the ordinance, in so far as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution."

Article 1, section 8, clause 3, of the United States Constitution reads:

"The Congress shall have power * * * To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."

Counsel for defendant rely upon *Robbins* v. *Shelby County*, 120 U. S. 489, 7 S. Ct. 592, to sustain the contention that the ordinance is violative of the commerce clause, *supra*. That case involved a tax upon a "drummer" or "traveling salesman" which is clearly distinguishable from the case at bar wherein the *gravamen* of defendant's offense was her "doing business" in the city of Richmond without first having procured the required license. It is not controverted that the defendant worked four days selling merchandise to the clerks of two large retail stores in the city of Richmond.

That the distinction between "mere solicitation" and "doing business" is more ethereal than real is, we think, [fol. 22] exemplified in the expression of Mr. Justice Rutledge in his dissent in *McLeod* v. *Dilworth Co.*, 64 Sup. Ct. 1030, 1033: "The old motion that 'mere solicitation' is not 'doing business' when it is regular, continuous, and persistent, is fast losing its force."

It is beyond dispute that both the initial and the ultimate burden of the tax imposed in the case at bar is the same and rests upon the defendant—the solicitor—who is an independent agent within the taxing jurisdiction, and upon her independent acts of soliciting which transpired in the city, and does not in the least rest upon the garment company which is outside of the State.

Since the decision of the Supreme Court in *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, 60 Sup. Ct. 388, the former views as to the freedom of interstate commerce from local taxation have been greatly modified.

Following the doctrine announced in that case, this court, in *Dunston* v. *City of Norfolk*, 177 Va. 689, 15 S. E. (2d) 86, held that the States have a right to require interstate commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such [fol. 23] right may, in some measure, affect the commerce or increase the cost of business.

Mr. Justice Spratley, in his analysis of the Berwind-White decision, clearly draws the distinction between that case and *Robbins* v. *Shelby County, supra*. In this opinion this is said:

"The defendant relies on the often cited case of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, decided in 1887, and the decisions in line with it. There it was held that the State taxation upon interstate commerce or upon the privilege of engaging in it was a burden, and consequently violative of the purpose of the commerce clause. A vigorous dissent by Mr. Chief Justice Waite, joined in by Mr. Justice Field and Mr. Justice Gray, asserted the principle that the validity of a state tax depended upon the question whether it was discriminatory against citizens of one State in favor of those of another.

"In recent years, there has been a gradual relaxation and modification of the strict and narrow interpretation applied in the above case as to the purpose of the commerce clause. The decisions in many of the later cases are predicated upon the presence or absence of discrimination.

"Finally, the Supreme Court of the United States has declined to deny to the States the right to levy a tax upon [fol. 24] interstate commerce merely because it is such commerce. The latest cases recognize and admit the right of the States to require such commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such right may, in some measure, affect the commerce or increase the cost of doing business. They declare that the purpose of the commerce clause is to allow interstate commerce to compete on a fair and equal basis with local commerce.

"Under the principles at present applied, the test of the validity of a State taxing law is whether it may, in its practical operation, be made an instrument for impeding or destroying interstate commerce or placing it at a disadvantage in competition with intrastate business."

In our opinion, the decision of the case at bar must rest upon the decision in the *Dunston case, supra*, and therefore, the judgment of the trial court is affirmed.

Affirmed.

[fol. 25] IN SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 2901

DOROTHY NIPPERT, Plaintiff in error,

against

CITY OF RICHMOND, Defendant in error

JUDGMENT—March 5, 1945

Upon a writ of error to a judgment rendered by the Hustings Court of the city of Richmond on the 16th day of June, 1944.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be, and is hereby, affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages and also its costs by it expended about its defense herein.

Which is ordered to be certified to the said Hustings court.

[fol. 26] Clerk's Certificate to transcript omitted in printing.

[fol. 27] IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 2901

DOROTHY NIPPERT, Petitioner,

vs.

CITY OF RICHMOND, Respondent

PETITION FOR APPEAL—Presented to the Chief Justice of the U. S. April 27, 1945

To Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia:

Your petitioner, Dorothy Nippert, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

Your petitioner was arrested on the 20th day of January, 1944 in the city of Richmond and charged with unlawfully engaging in the business of a solicitor in the City of Richmond without having procured a city license assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937, and your petitioner was brought into the Police Court of the City of Richmond on the 22nd day of January, 1944 and was fined $25.00 and costs and ordered to purchase a city license as provided by Section 23, Chapter 10 of the Richmond City Code of 1937.

In the hearing before the police court justice evidence was presented to the trial justice that Dorothy Nippert was in charge of a sales force soliciting orders for a ladies' garment manufactured by the American Garment Com-[fol. 28] pany which was owned and operated by John V. Rosser in Washington, D. C. and that orders were solicited for this garment and a certain down payment was taken from the purchaser, which in most instances covered the commission of the solicitor, and the order was forwarded to Washington where it was filled and forwarded C. O. D. through the U. S. mails to the purchaser, and it was contended in the Police Court that the ordinance insofar as it referred to the petitioner in requiring that she obtain a permit was in conflict with the Commerce Clause of the Federal Constitution.

An appeal was noted from the judgment of the Police Court to the Hustings Court of the City of Richmond where a trial denovo was had and the same question was presented to the Hustings Court, that is, that the ordinance insofar as it referred to petitioner was in conflict with the Commerce Clause of the Federal Constitution and the following statement was an agreed statement of the facts as presented to the Hustings Court:

> "The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from City to City throughout the country and obtain orders for this particular garment,

which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C. O. D. for the balance to the purchaser. The solicitors at no time make a delivery of the article.

The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, [fol. 29] and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the place of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not therefore procured a City revenue license from the City of Richmond."

The Hustings Court found your petitioner guilty of unlawfully engaging in Richmond in the business of a solicitor without having procured a city license assessable under Section 23 of Chapter 10 of the Richmond City Code and fined your petitioner $5.00 and costs.

A petition for a Writ of Error to the Hustings Court of the City of Richmond was filed in the Supreme Court of Appeals of Virginia in which there was assigned the following errors:

"1. The Court erred in holding that the City had the authority to pass the ordinance in question.

2. The Court erred in refusing to hold that the ordinance insofar as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution.

3. The Court erred in holding that petitioner had violated the law in soliciting orders in interstate commerce without having procured a city license as a solicitor."

The Supreme Court of Appeals of Virginia allowed a Writ of Error and the dominant assignment of error as set forth in the opinion of the Supreme Court of Appeals of Virginia was that the Court erred in refusing to hold that the ordinance insofar as it referred to petitioner was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution which reads:

[fol. 30] "The Congress shall have power • • • to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

That the Supreme Court of Appeals of the state of Virginia is the highest Court of said State in which a decision in this suit can be had.

That in said cause there is drawn in question the validity of the municipal ordinance of the City of Richmond on the ground that the said municipal ordinance is repugnant to the Constitution and laws of the United States and the decision is in favor of its validity, notwithstanding, your petitioner contends that said municipal ordinance violates the Commerce Clause of the Federal Constitution being Article 1, Section 8, Clause 3 of the United States Constitution.

That, therefore, in accordance with sec. 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit, under sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules

of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

[fol. 31] Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of Appeals of Virginia, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of Appeals of the State of Virginia may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Appeals of the State of Virginia, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Cornelius H. Doherty, Stanley H. Kamerow, Attorneys for Petitioner.

April 23, 1945.

Appeal refused.

Preston W. Campbell, Chief Justice.

[fol. 32] IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Dorothy Nippert, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of Appeals of Virginia, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the final judgment dated the 5th day of March, 1945, of the Supreme Court of Appeals of Virginia, as prayed in said petition, and that the Clerk of the Supreme Court of Appeals of Virginia shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the [fol. 33] Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient bond for costs in the sum of Two Hundred Dollars, that said appellant shall prosecute said appeal to effect and answer all costs if he fails to make his plea good.

Harlan F. Stone, Chief Justice of the United States.

May First, 1945.

[fol. 34] IN THE SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ASSIGNMENT OF ERRORS

The petitioner assigns the following errors in the record and proceedings in this cause:

1. The Court erred in refusing to hold that the ordinance of the City of Richmond, insofar as it referred to petitioner, was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution, as it was contended by the petitioner in each Court.

2. The Court erred in holding that petitioner had violated the ordinance of the City of Richmond in soliciting orders in Interstate Commerce without having procured a city license as a solicitor and a permit from the Director of Public Safety.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said judgment of the Supreme Court of Appeals of Virginia, dated the 5th day

of March, 1945, in the above entitled cause, be reversed and judgment entered in favor of this appellant.

Cornelius H. Doherty, Stanley H. Kamerow, Attorneys for Appellant.

April 23, 1945.

[fol. 35] In the Supreme Court of Appeals of Virginia

[Title omitted]

Acknowledgment of Service

I, the undersigned, of counsel for the City of Richmond, hereby acknowledge to have received a copy of the petition for appeal, the order allowing the appeal, the assignment of errors and statement as to jurisdiction.

Reference is also directed to Rule 12, Sub-Section 3 of the Rules of the Supreme Court of the United States, authorizing the appellee, within fifteen days after service of the foregoing papers, to file a typewritten statement disclosing any matter or ground making against the jurisdiction of the Supreme Court of the United States which has been asserted by the appellant.

Henry R. Miller, Jr., Asst. City Atty., Attorney for City of Richmond.

May 4, 1945.

[fol. 36] Citation in usual form showing service on Henry R. Miller, Jr., omitted in printing.

[fols. 37-38] Bond on appeal for $200.00 approved, omitted in printing.

[fol. 39] In the Supreme Court of Appeals of Virginia

[Title omitted]

Stipulation for Transcript of Record

It is hereby stipulated and agreed by the parties hereto, through their respective counsel of record, that the Clerk

shall prepare, and it will constitute the entire record necessary on this appeal, the following:

1. Commencing on Page 10 of the record, titled "Record", through Page 17, as it is set forth in the printed record No. 2901.
2. Memo: "Writ of Error granted".
3. Petition for appeal.
4. Order allowing appeal.
5. Assignment of errors.
6. Acknowledgment of service.
7. Copy of opinion of this Court.
8. This Stipulation.

Cornelius H. Doherty, Stanley H. Kamerow, Attorneys for Appellant; Henry R. Miller, Jr., Asst. City Atty., Attorney for City of Richmond.

[fol. 40] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed May 19, 1945

Comes now the appellant and adopts her Assignment of Errors as her statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Cornelius H. Doherty, Stanley H. Kamerow, Attorneys for Appellant.

A copy of the foregoing statement and designation acknowledged this 17th day of May, 1945.

Henry R. Miller, Jr., Attorney for Appellee.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 11, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 49717. Virginia Supreme Court of Appeals. Term No. 72. Dorothy Nippert, Appellant, vs. City of Richmond. Filed May 14, 1945. Term No. 72 O. T. 1945.

(9467)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 72

DOROTHY NIPPERT,

Petitioner,

vs.

CITY OF RICHMOND

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT AS TO JURISDICTION

CORNELIUS H. DOHERTY,
STANLEY H. KAMEROW,
Counsel for Appellant.

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IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 2901

DOROTHY NIPPERT,

Petitioner,

vs.

CITY OF RICHMOND,

Respondent

STATEMENT AS TO JURISDICTION

Statement of the Case

The appellant, Dorothy Nippert, was employed as a solicitor for the American Garment Company, which is owned and operated by John V. Rosser, and has its place of business at 3617 12th Street Northeast, Washington, D. C., and she traveled from city to city and state to state taking orders for a ladies' garment, which was manufactured by the American Garment Company. A down payment was required from the purchaser and the order was then forwarded to the American Garment Company in Washington, D. C., and the order filled and forwarded to the purchaser by mail C.O.D., the solicitor at no time making a delivery of the article.

The appellant on January 20, 1944, was soliciting orders in the City of Richmond for the American Garment Company, and on that day was arrested and charged with

"unlawfully engaging in the City of Richmond in the business of a solicitor without having procured a City license which was assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937".

The appellant was arraigned and pleaded "Not Guilty" to the charge, and in the Police Court of the City of Richmond relied upon the defense that she was soliciting orders in interstate commerce, and that the ordinance of the City of Richmond, insofar as it referred to the appellant, was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution.

The appellant was found guilty as charged and fined Twenty-Five Dollars ($25.00) and costs and ordered to purchase a City license, as provided by Section 23, Chapter 10 of the Richmond City Code of 1937.

An appeal was noted from the judgment of the Police Court to the Hustings Court of the City of Richmond, where a trial de novo was had, and the same question and defense was presented to that Court, and the appellant was found guilty of a violation of the ordinance requiring her to obtain a license, and was fined Five Dollars ($5.00).

The following is an agreed statement of the facts as found by the Hustings Court:

> "The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from City to City throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C.O.D. for the balance

to the purchaser. The solicitors at no time make a delivery of the article.

The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not therefore procured a City revenue license from the City of Richmond."

A petition for a writ of error to the Hustings Court of the City of Richmond was filed in the Supreme Court of Appeals of Virginia, in which, among other errors, it was assigned that the Court had erred in refusing to hold that the ordinance of the City of Richmond, insofar as it referred to appellant, was in conflict with the commerce clause of the Federal Constitution. The Supreme Court of Appeals of the State of Virginia allowed a writ of error, and, in an opinion, which is attached hereto as Exhibit One, covering the error assigned—that the ordinance, insofar as it referred to the appellant, was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution—affirmed the

decision of the Hustings Court, expressly passing upon the Federal question and sustaining the validity of the City ordinance, as against the appellant's contention that it violated her constitutional rights.

Opinion Below

The proceedings before the Police Court of the City of Richmond and the Hustings Court of the City of Richmond were oral and no opinions were filed in either case, but the opinion of the Supreme Court of Appeals of Virginia is reported as *Nippert* v. *The City of Richmond,* 183 Virginia, 689, a copy of which opinion is attached hereto as Exhibit One.

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C., secs. 344 (a), 861a).

Statute of the State Involved

The ordinance of the City of Richmond, the validity of which is involved, is Chapter 10, Section 23 of the Richmond City Code of 1937, which is as follows:

> "Chapter 10, Section 23—Agents—Solicitors— Persons, Firms or Corporations engaged in business as solicitors * * * $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933.)"

Date of Judgment and of Application for Appeal

The opinion and judgment of the Supreme Court of Appeals of the State of Virginia was rendered on March 5, 1945, and is reported as "*Nippert* v. *The City of Richmond,*

183 Virginia, 689, a copy of which is appended hereto as Exhibit One. The application for appeal was presented April 23, 1945.

Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of this Court are:

King Mfg. Co. v. *Augusta*, 277 U. S. 100, 114;
Crenshaw v. *Arkansas*, 227 U. S. 389, 395;
Robbins v. *Shelby County Taxing District*, 120 U. S., 489, 497, 498;
Real Silk Hosiery Mills Inc. v. *City of Portland*, 268 U. S. 325;
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 55.
Murdock v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 110.

Raising the Federal Questions

The proceedings in the Police Court and in the Hustings Court of the City of Richmond were very informal, and the constitutional question—that the ordinance of the City of Richmond which required that the appellant obtain a permit from the Director of Public Safety before obtaining a license, and the obtaining of a license in order to solicit orders in interstate commerce, violated the appellant's constitutional rights under Article 1, Section 8, Clause 3 of the United States Constitution, was presented and passed upon orally by the Court.

In appellant's petition to the Supreme Court of Appeals for a writ of error there was assigned the following assignment of errors:

> "1. The Court erred in holding that the City had the authority to pass the ordinance in question.

2. The Court erred in refusing to hold that the ordinance, insofar as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution.

3. The Court erred in holding that petitioner had violated the law in soliciting orders in interstate commerce without having procured a city license as a solicitor."

The Supreme Court of Appeals of Virginia, in its opinion, attached here as Exhibit One, expressly passed upon the contention of the appellant—that the requirements of the ordinance of the City of Richmond requiring that she obtain a license in order to solicit orders in interstate commerce were unconstitutional, and sustained the ordinance as against its claimed invalidity under the commerce clause of the Federal Constitution.

Statement of the Grounds upon Which It Is Contended the Questions Involved Are Substantial

1. The decision and judgment of the Supreme Court of Appeals of Virginia, sustaining the validity of the ordinance of the City of Richmond, which required the appellant to obtain a permit from the Director of Public Safety and to obtain a license before she would be permitted to solicit orders in interstate commerce, overrules, and is in direct conflict with, every case which has been decided by the Supreme Court of the United States on this specific point.

2. The facts in this case bring it clearly within the case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497, 498, and duplicate the facts as presented in the case of *Real Silk Hosiery Mills Inc.* v. *City of Portland*, 268 U. S. 325.

3. The decision of the Supreme Court of Appeals of Virginia expressly permits the City of Richmond to require of the appellant that she obtain a permit from the Director of Safety of the City of Richmond before applying for a license to solicit, and also required her to pay $50.00 for a license in order to solicit orders for goods to be shipped in interstate commerce. To permit the City of Richmond to place in the hands of any officer of that City the power to pass upon whether a permit should be issued to any individual for the purpose of obtaining a license, would, in effect, give to that officer the power to control or suppress the privilege of even obtaining the license to solicit for the sale of goods in interstate commerce. *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 110.

4. The license tax required by the City of Richmond from the appellant prior to her being permitted to solicit in interstate commerce is a flat license tax, and is violative of her constitutional rights under the Constitution to solicit for the sale of goods in interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497, 498; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 55.

5. The appellant's livelihood depends upon her right under the United States Constitution to solicit orders for the sale of goods in interstate commerce, and if she were to be required to submit to the whims of any person in authority as to whether or not she might obtain a permit in order to obtain the license to continue her business as a solicitor and also to pay a flat tax for the privilege of soliciting for orders in interstate commerce, that person could very readily, by reason of his requirements, prevent appellant from continuing her business.

Conclusion

It is respectfully submitted that this Court has jurisdiction of the appeal.

Dated: April 23, 1945.

Respectfully submitted,

CORNELIUS H. DOHERTY,
STANLEY H. KAMEROW,
Attorneys for Appellant.

EXHIBIT NUMBER ONE

Present: Campbell, C. J., Holt, Hudgins, Browning, Eggleston and Spratley, JJ.

Record No. 2901

DOROTHY NIPPERT

v.

CITY OF RICHMOND

OPINION BY CHIEF JUSTICE PRESTON W. CAMPBELL

Richmond, Virginia, March 5, 1945.

From the Hustings Court of the City of Richmond, John H. Ingram, Judge

The litigants agree that in the case at bar the principal question is whether the ordinance of the city of Richmond, under which the defendant, Dorothy Nippert, was convicted, is violative of the Federal Constitution. That ordinance reads:

"*Chapter 10, Section 23.*—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors * * * $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933.)"

The defendant was arraigned in the Hustings Court of the City of Richmond upon a warrant emanating from the police justice's court, which charged "that on the 20th day of January, 1944, at said city of Richmond Dorothy Nippert did unlawfully engage in Richmond in a business of a solicitor without having procured a city license assessable under section 23 of chapter 10 of the Richmond City Code of 1937."

Defendant, upon her arraignment, pleaded not guilty, and with her consent and the concurrence of the city attor-

ney, the court proceeded to hear and determine the case without a jury. At the conclusion of the evidence, the court found the defendant guilty as charged in the warrant and assessed her fine at five dollars.

The facts certified by the trial judge are as follows:

"The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N.E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from city to city throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C.O.D. for the balance to the purchaser. The solicitors at no time make a delivery of the article.

"The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

"The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy

Nippert, had not *therefore* procured a City revenue license from the city of Richmond."

The dominant assignment of error is:

"The Court erred in refusing to hold that the ordinance, insofar as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution."

Article 1, section 8, clause 3, of the United States Constitution reads:

"The Congress shall have power * * * To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

Counsel for defendant rely upon *Robbins* v. *Shelby County*, 120 U. S. 489, 7 S. Ct. 592, to sustain the contention that the ordinance is violative of the commerce clause, *supra*. That case involved a tax upon a "drummer" or "traveling salesman" which is clearly distinguishable from the case at bar wherein the *gravamen* of defendant's offense was her "doing business" in the city of Richmond without first having procured the required license. It is not controverted that the defendant worked four days selling merchandise to the clerks of two large retail stores in the city of Richmond.

That the distinction between "mere solicitation" and "doing business" is more ethereal than real is, we think, exemplified in the expression of Mr. Justice Rutledge in his dissent in *McLeod* v. *Dilworth Co.*, 64 Sup. Ct., 1030, 1033: "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous, and persistent, is fast losing its force."

It is beyond dispute that both the initial and the ultimate burden of the tax imposed in the case at bar is the same and rests upon the defendant—the solicitor—who is an independent agent within the taxing jurisdiction, and upon her independent acts of soliciting which transpired in the city, and does not in the least rest upon the garment company which is outside of the State.

Since the decision of the Supreme Court in *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, 60 Sup. Ct. 388, the

former views as to the freedom of interstate commerce from local taxation have been greatly modified.

Following the doctrine announced in that case, this court, in *Dunston* v. *City of Norfolk*, 177 Va. 689, 15 S. E. (2d) 86, held that the States have a right to require interstate commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such right may, in some measure, affect the commerce or increase the cost of business.

Mr. Justice Spratley, in his analysis of the Berwind-White decision, clearly draws the distinction between that case and *Robbins* v. *Shelby County, supra.* In this opinion this is said:

"The defendant relies on the often cited case of *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, decided in 1887, and the decisions in line with it. There it was held that the State taxation upon interstate commerce or upon the privilege of engaging in it was a burden, and consequently violative of the purpose of the commerce clause. A vigorous dissent by Mr. Chief Justice Waite, joined in by Mr. Justice Field and Mr. Justice Gray, asserted the principle that the validity of a state tax depended upon the question whether it was discriminatory against citizens of one State in favor of those of another.

"In recent years, there has been a gradual relaxation and modification of the strict and narrow interpretation applied in the above case as to the purpose of the commerce clause. The decisions in many of the later cases are predicated upon the presence or absence of discrimination.

"Finally, the Supreme Court of the United States has declined to deny to the States the right to levy a tax upon interstate commerce merely because it is such commerce. The latest cases recognize and admit the right of the States to require such commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such right may, in some measure, affect the commerce or increase the cost of doing business. They declare that the purpose of the commerce clause is to allow interstate commerce to compete on a fair and equal basis with local commerce.

"Under the principles at present applied, the test of the validity of a State taxing law is whether it may, in its practical operation, be made an instrument for impeding or destroying interstate commerce or placing it at a disadvantage in competition with intrastate business."

In our opinion, the decision of the case at bar must rest upon the decision in the *Dunston case, supra*, and therefore, the judgment of the trial court is affirmed.

Affirmed.

(8310)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 72

DOROTHY NIPPERT,
Apellant,

vs.

CITY OF RICHMOND.
Apellee.

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

I.

THE OPINION OF THE COURT BELOW

The Opinion of the Supreme Court of Appeals of Virginia (R. 17) is reported in 183 Virginia, Page 689.

II.

JURISDICTION

1. The decision and judgment of the Supreme Court of Appeals of Virginia, sustaining the validity of the ordinance of the City of Richmond, which required the appellant to obtain a permit from the Director of Public Safety and to obtain a license before she would be per-

mitted to solicit orders in interstate commerce, overrules, and is in direct conflict with, every case which has been decided by the Supreme Court of the United States on this specific point.

2. The decision of the Supreme Court of Appeals of Virginia, affirming the judgment of the Hustings Court, holds that an ordinance of the City of Richmond which leaves to the discretion of its Director of Public Safety whether a permit for a license shall be issued, does not violate appellant's constitutional rights.

3. The decision of the Supreme Court of Appeals of Virginia expressly permits the City of Richmond to require of the appellant that she obtain a permit from the Director of Safety of the City of Richmond before applying for a license to solicit, and also required her to pay $50.00 for a license in order to solicit orders for goods to be shipped in interstate commerce. To permit the City of Richmond to place in the hands of any officer of that City the power to pass upon whether a permit should be issued to any individual for the purpose of obtaining a license, would, in effect, give to that officer the power to control or suppress the privilege of even obtaining the license to solicit for the sale of goods in interstate commerce.

4. The statutory provision believed to sustain the jurisdiction of this Court is section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C., secs. 344 (a), 861 a).

III.

STATEMENT OF THE CASE

The appellant was arrested in the City of Richmond, Virginia on the 20th day of January, 1944 and charged with unlawfully engaging in the business of soliciting orders in the City of Richmond without having procured

a city license assessible under Section 23 of Chapter 10 of the Richmond City Code of 1937 and your petitioner was brought into the Police Court of the City of Richmond on the 22nd day of January, 1944 and was fined $25.00 and costs and ordered to purchase a city license as provided by Section 23, Chapter 10 of the Richmond City Code of 1937. (R. 11).

In the hearing before the Police Court Justice evidence was presented that the appellant was in charge of a sales force soliciting orders for a ladies' garment manufactured by the American Garment Co. which was owned and operated by John V. Rosser in Washington, D. C. and that when orders were solicited for this garment a certain down payment was taken from the purchaser, which in most instances covered the commission of the solicitor, and the order was forwarded to Washington where it was filled and forwarded C. O. D. by the American Garment Co. through the United States mails to the purchaser and it was contended in the Police Court that the ordinance, insofar as it referred to the appellant, requiring that she obtain a permit, was in conflict with the commerce clause of the Federal Constitution.

An appeal was noted from the judgment of the Police Court to the Hustings Court of the City of Richmond where a trial de novo was had and the same question was presented to the Hustings Court, that is, that the ordinance, insofar as it referred to appellant, was in conflict with the commerce clause of the Federal Constitution.

The Hustings Court found appellant guilty of unlawfully engaging in Richmond in the business of a solicitor without having procured a city license assessible under Section 23 of Chapter 10 of the Richmond City Code and fined appellant $5.00 and costs. (R. 12)

A petition for a writ of error to the Hustings Court of the City of Richmond was filed in the Supreme Court

of Appeals of Virginia and the dominant assignment of error was that the ordinance of the City of Richmond was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution and a writ of error was granted and the Supreme Court of Appeals of Virginia affirmed the decision of the Hustings Court holding that the license required under Section 23, Chapter 10 of the Richmond City Code of 1937 did not violate appellant's constitutional rights. (R. 17)

IV.

SPECIFICATION OF ERRORS

1. The Supreme Court of Appeals of Virginia erred in refusing to hold that the ordinance of the City of Richmond, insofar as it referred to appellant, was in conflict with appellant's rights under Article 1, Section 8, Clause 3 of the Constitution of the United States.

2. The Supreme Court of Appeals of Virginia erred in affirming the decision of the Hustings Court that appellant was guilty of violating the ordinance of the City of Richmond in soliciting orders in interstate commerce without having first procured a permit from the Director of Public Safety and a city license as a solicitor.

V.

SUMMARY OF ARGUMENT

1. The license tax imposed by the ordinance of the City of Richmond is a flat license tax and the requirement of the payment of this tax as a condition of the exercise of the privilege of soliciting orders for the sale of goods in interstate commerce is a direct burden upon interstate commerce and violates appellant's rights under the Constitution of the United States.

2. The requirement of the ordinance of the City of Richmond, that a permit from the Director of Public Safety

be obtained before a license will be issued, gives to the Director the discretion as to whether a permit should be issued and would in effect give to that officer the power to control or suppress the privilege of soliciting orders in interstate commerce and is a direct burden on interstate commerce and violates appellant's rights under the Constitution of the United States.

VI.

ARGUMENT

The record in this case clearly presents to this Court for its decision the question as to whether or not a solicitor, having no fixed place of business, and soliciting orders for a foreign firm can be required by the City of Richmond to submit herself to the discretion of an official of that City, first as to whether or not she is entitled to a permit and secondly, if a permit is issued, to pay $50.00 for a license for the privilege of soliciting such orders in interstate commerce.

The ordinance of the City of Richmond which is material to a decision of this case is as follows:

> "Chapter 10, Section 4.—There shall be levied and collected for the calendar year 1931 and each calender year thereafter, the following license taxes, to-wit: (December 24, 1930)
>
> "Chapter 10. Section 23.—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors . . . $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933.)
>
> "Chapter 10, Section 166½—Permits of Director of Public Safety Required for Certain Licenses.—(a) Every person, firm and corporation desiring a license

under sections 14, 16, 23, 94, 120 and 143, of this chapter shall first apply to the Director of Public Safety for a permit on behalf of said individual, firm or corporation, as the case may be, to conduct the business which is desired to be conducted and shall produce to that Director evidence of the good character of the individual, the members of the firm, or the chief officers of the corporation, as the case may be, and it shall thereupon be the duty of the Director of Public Safety to make a reasonable investigation of the character of said individual, each of the members of the firm, or each of the chief officers of the corporation, as the case may be, and if he be satisfied that the individual, the members of the firm or the principal officers of the Corporation, as the case may be, be of good moral character and a person or persons fit to engage in the proposed business, he shall issue the permit. The form of the application for such permit and the form of the permit itself shall be prepared and furnished by the Director of Public Safety." (R. 13, 14)

It has been contended by the appellant that the above quoted ordinance, insofar as it affects appellant's rights to solicit orders in interstate commerce, is in conflict with Article 1, Section 8, Clause 3 of the United States Constitution which reads:

> "The Congress shall have power ***to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

This particular question has been presented to this Court on numerous occasions and it has been held at all times that the City could not require such a license for the privilege of soliciting orders.

In the case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, Robbins was found guilty of soliciting without having first obtained a license as required by the Statute in force in Shelby Taxing District, which contained, among other things, the following:

"All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months."

Robbins was soliciting orders for the firm of "Rose, Robbins & Co." of Cincinnati, and Robbins contended that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several states.

The Court, among other things, commencing at Page 496, stated as follows:

"But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country

> are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

and then again, commencing on Page 497, is the following:

> "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

and then again at Page 498 is the following:

> "If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation.

"To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce."

The Robbins case has been referred to time and time again throughout the various cases in this Court and the decision of that case has never been reversed.

In the recent case of *McGoldrick* v. *Berwind-White Coal Mining Co.* 309 U. S. 33, 60 S. Ct. Re. 388, the Court at page 55 made the following reference to the Robbins case:

"It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following Robbins v. Shelby County Taxing District, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. See Robbins v. Shelby County Taxing District, supra, 120 U. S. page 498, 7 S. Ct. page 596, 30 L. Ed. 694; Caldwell v. North Carolina, 187 U. S. 622, 632, 23 S. Ct. 229, 233, 47 L. Ed. 336. In all, the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances may, by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, see Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 625, 54 S. Ct. 542, 545,

78 L. Ed. 1025, and cases cited, it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. Compare Hammand Packing Co. v. Montana, 233 U. S. 331, 34 S. Ct. 596, 58 L. Ed. 985, Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109, with Schollenberger v. Pennsylvania, 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49; Robbins v. Shelby County Taxing District, supra; Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833, 62 A. L. R. 45. It is enough for present purposes that the rule of Robbins v. Shelby County Taxing District, supra, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

It is evident from the foregoing statement that the requirement of a fixed sum license tax which is imposed upon the privilege of soliciting orders in interstate commerce is unconstitutional. No question is being raised in this case on the right of the City of Richmond or the State of Virginia to place a tax upon the income derived from the business but merely the taxing of the privilege of engaging in the business.

In the case of *Brennan* v. *Titusville*, 153 U. S. 289, one J. W. Brennan was engaged as an agent to solicit orders for pictures and frames manufactured by J. A. Shephard in Chicago and Brennan was convicted in the City of Titusville, Pa. for an ordinance of that city requiring all persons canvassing or soliciting within the said City to pay certain sums of money for a license to solicit, the amount being dependent upon the length of time the solicitor desired to remain in the City and Brennan was sentenced to pay the sum of $25.00 and costs.

The Court at page 302 made the following statement:

"That this license tax is a direct burden on interstate commerce is not open to question."

And again at page 303 the Court made this observation:

> "In Leloup v. Mobile, 127 U. S. 640, 645, are these words from Mr. Justice Bradley:
>
> 'Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.' "

The Court then in referring to the tax required under the ordinance of the City of Titusville at page 303 stated as follows:

> "It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

The agreed statement of facts in this case (R. 13-16) is almost verbatim with the facts that were presented to this Court for decision in the case of *Real Silk Hosiery Mills, Inc.*, v. *City of Portland*, 268 U. S. 325, in which case the facts disclose that the Real Silk Hosiery Mills, Inc., was an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis, Indiana, and selling it throughout the United States to consumers only. It employed two thousand representatives who solicit orders in most of the important cities and towns throughout the United States. The City of Portland passed an ordinance which required that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure a license and file a bond.

The appellant filed a bill in the United States District Court for Oregon challenging the ordinance and asking that its enforcement be restrained upon the ground, among others, that it interfered with and burdens interstate commerce and was repugnant to Article 1. Section 8 of the Federal Constitution. The Trial Court upheld the enactment and sustained a motion to dismiss the bill. This was affirmed by the Circuit Court of Appeals.

The Court, at Page 335, said:

> "Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 497.***
>
> "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.' Manifestly, no license fee could have been required of appellant's solicitors if they had travelled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189.
>
> "The decree of the court below must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion."

All the foregoing cases clearly indicate that any burden or control on interstate commerce must come from the Congress of the United States which has the sole power to regulate commerce among the various states and that

any ordinance which attempts or in anywise interferes with the privilege of engaging in interstate commerce is unconstitutional and void. It has been the apparent view of the officials of the Commonwealth of Virginia and the City of Richmond that a solicitor would not be required to obtain a license either in Richmond or the State of Virginia and this view is well set forth in the brief on behalf of the Commonwealth of Virginia and the City of Richmond in the matter of the petition for a writ of certiorari filed in this Court by the *Christian Corp.* v. *The Commonwealth of Virginia and the City of Richmond* No. 812 October Term 1941 and in respondent's brief at page 7 is the following:

> "But a State license as a commission merchant is only required where such merchant has established a definite place of business, section 131 of the Tax Code of Virginia (Acts of Assembly 1928, p. 97) providing that 'every license granting authority to engage in ***any business*** shall designate the place of such business*** at some specified house or other definite place within the county or city***.' There is no State license required of an itinerant solicitor of orders in a city or town with no place of business therein (such as a drummer) and consequently section 296 of the Tax Code does not afford any authority for the assessment of a local license in such a case."

This case contains more than the question covering a flat license tax for before it is possible even to obtain a license, it is necessary that certain information be given to the Director of Public Safety of the City of Richmond and that official passes upon the question as to whether or not the person who is to solicit, or the firm for which she sells, are proper parties to obtain a permit to obtain a license and it gives to that individual, in effect, the right to grant or refuse, even with the payment of a flat license tax, the privilege of soliciting orders in interstate commerce. While the questions raised in this case had nothing to do with

the first amendment to the Constitution, nevertheless the reasoning in some of the cases covering that amendment have a very direct bearing on this case. In the case of *Murdock* v. *Commonwealth of Pa.*, 319 U. S. 105, 63 S. Ct. Re. 70, the Court at page 112 made the following statement:

> "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Magnano Co. v. Hamilton, 292 U. S. 40, 44, 45, 54 S. Ct. 599, 601, 78 L. Ed. 1109, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.
>
> "It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., 309 U. S. 33, 56-58, 60 S. Ct. 388, 397, 398, 84 L. Ed. 565, 128 A. L. R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. Id., 309 U. S. at

page 47, 60 S. Ct. at page 392, 84 L. Ed. 565, 128 A.L.R. 876 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."

The question covering the application for a permit and the requirements covering the information to be given before a permit is required to be issued by the Director of Safety is very well covered in the case of *Pictorial Review Co.* v. *City of Alexandria*, 46 F (2d) 337 where the Court at page 339 stated as follows:

"There is no question but that the city has the right to protect its citizens from imposition by persons who may violate its police regulations intended for the protection of property, morals, health, and safety, where the nature of the business is inherently dangerous; but it cannot, because of any supposed or real difficulty in controlling the personal conduct of individual agents, not necessary to their employment, impose an unwarranted burden upon an otherwise harmless and legitimate traffic in interstate commerce. The complainant is admittedly engaged in a business involving no element of danger, and restrictions of the kind embraced in this ordinance are a direct interference with that free and full flow of trade between citizens of the several states which is contemplated by the constitutional provision intrusting to Congress the exclusive power to regulate it. If the city can require a permit, it may also impose a license fee of such magnitude as to be prohibitive. The requirement with respect to examination and the giving of bond, coupled with the power in the mayor with the right of appeal to the council to deny altogether the

right any one to act as agent of the complainant, is an unreasonable restriction upon its business which affects directly interstate commerce."

CONCLUSION

It is respectfully submitted that the requirement of the ordinance of the City of Richmond, which required that the appellant submit to the whims of any person as to whether or not she might obtain a permit to obtain a license to solicit orders for goods to be shipped in interstate commerce and also the requirement that she pay a flat license fee of $50.00 for the privilege of soliciting orders for goods to be shipped in interstate commerce, is a burden on interstate commerce and violates appellant's constitutional rights and is void, and that the judgment of the Supreme Court of Appeals of Virginia be reversed.

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STANLEY H. KAMEROW

Attorneys for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 72

DOROTHY NIPPERT, APPELLANT

vs.

CITY OF RICHMOND, APPELLEE

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF ON BEHALF OF THE APPELLEE

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BRIEF ON BEHALF OF THE APPELLEE

INTRODUCTION

The appellant, Dorothy Nippert, was convicted of engaging in the business of soliciting in the City of Richmond without having procured a city revenue license therefor. She was soliciting orders for the sale and subsequent delivery by John B. Rosser, trading as The American Garment Company of Washington, D. C.

The orders were for women's garments to be shipped in interstate commerce.

While there is no controversy as to the facts and generally speaking the facts have been fairly stated in the appellant's brief, there is neverthless an important phase of the case shown in the record which is not mentioned in that brief.

IMPORTANT FACTS NOT MENTIONED IN APELLANT'S BRIEF

(1) It appears from page 15 of the Record that Dorothy Nippert, who was soliciting orders at the time complained of in the City of Richmond,

> "* * * had been engaged *for four days* prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, *been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within places of business of one of the Five and Ten Cent stores in the City of Richmond, and therein soliciting the clerks in those stores so as to procure from those clerks orders for the sale of merchandise on behalf of the American Garment Company* * * *." (Italics supplied).

The portion of the record quoted above in italics is not mentioned at all in the appellant's brief, and the counsel for the appellee, City of Richmond, rely strongly upon those facts as a basis of distinction between this case and the case of *Robbins* v. *Shelby County*, 120 U. S. 489, on which the counsel for Dorothy Nippert bases her case.

Proof of solicitation for four days within two large retail stores in Richmond is the basis for the tax upon the solicitor, the plaintiff-in-error here.

(2) It also appears from the facts adduced at the trial (R. 15) that Dorothy Nippert was not an employee of the American Garment Company. This is important because it shows that the appellant was an independent actor, responsible for her own acts which transpired within the jurisdiction of the city of Richmond, Virginia.

PRINCIPLE CONTENDED FOR BY THE CITY OF RICHMOND

The counsel for the appellee assert that the proof of solicitation by Dorothy Nippert in two large retail stores in Richmond for a period of four days constitutes proof of her "doing business" in Richmond and thereby removes this case from the class of those cases which involve a tax upon a "drummer" or "traveling salesman" in the limited degree shown by the facts in those cases led by *Robbins* v. *Shelby County, supra.*

POINT I.

The Supreme Court of Appeals of Virginia did not have presented to it the question as to the requirement of a permit from the director of public safety of Richmond.

POINT II.

The Richmond city ordinance prescribes reasonable conditions under which permits must be issued or denied by the director of public safety.

POINT III.

The record is silent as to whether or not an application for a permit was made to the director of public safety.

POINT IV.

The appellant was not an employee of the Washington manufacturing vendor and she solicited for four successive days in two large mercantile establishments in Richmond.

POINT V.

Richmond's tax was levied upon the regular, continuous and persistent soliciting in Richmond, which was a taxable event which transpired entirely within Richmond's limits and the tax levy is a valid exercise of local power.

ARGUMENT

As to Point I

State Court Did Not Consider Requirement of Permit

At page 5 of the typewritten "Statement as to Jurisdiction," which does not appear in the Record, there is the first mention of any possibility of an assignment of error being based upon the ordinance requirement as to the procurement of a permit from the director of public safety of the city of Richmond. Whatever was said and done in the police court and in the Hustings Court on the point was so casually and informally done that it made no impression on the court and no mention thereof was made by either court. No such point was made in the Supreme Court of Appeals of Virginia, either in the briefs or in the oral argument, although the same counsel have appeared for the appellant throughout all of the proceedings.

Furthermore, at page 4 of the typewritten transcript of the "Statement as to Jurisdiction," under "Statute of the State Involved," counsel for appellant quote section 23 of the city license code, the last line of which is: "Permit of Director of Public Safety required be-

fore a license will be issued." So that when one reads paragraph 4 of the "Statement of the Grounds upon which It is Contended the Questions Involved Are Substantial," (pages 6 and 7 of typewritten transcript of "Statement as to Jurisdiction") and the conclusion of the appellant's brief (page 16 thereof), it would appear that appellant's counsel contend that the permit is issued only in accordance with the "whims" of the city officer.

Counsel for appellant failed to quote in the "Statute of the State Involved," that portion of the city license code, namely: section 166½ (R. 14), which lays down a rule for the guidance of the director of public safety in determining whether or not a permit should be granted. A reading of that section shows that in the exercise of his discretion, he cannot act according to his "whims".

Finally, in this connection, the record is silent as to any application to the director for a permit, or that she was denied a permit. The offense charged is that the appellant unlawfully engaged in Richmond in the business of a solicitor without having procured a city license assessable under section 23 of chapter 10 of the Richmond City Code of 1937 (R. 10). She was not charged with doing such business without a permit.

As to Point II.

The City Ordinance Contains Reasonable Requirements as to Permit

The levying section of the city ordinance is section 23 (R. 13), and while it only mentions the fact that a permit must be procured from the director of public safety before the license will be issued, there is another section, 166½ (R. 14), which sets up a reasonable guide

for the action of the director in determining whether or not a permit will be issued.

Counsel for appellee respectfully assert that this ordinance is so similar to that approved by this court in the case of *Gundling* v. *Chicago,* 177 U. S. 183, that the ordinance now before this court should be sustained, even if it is proper to consider now the objections raised by the appellant. In the Gundling case this court considered in 1900 a decision of the Supreme Court of Illinois affirming a conviction for violating an ordinance forbidding the sale of cigarettes without a license. The Chicago ordinance is quoted in Mr. Justice Peckham's opinion (177 U. S. 183, 184). The ordinance required one desiring to sell cigarettes to make written application to the commissioner of health, which application should be accompanied by evidence that the applicant was a person of good character and reputation. This was transmitted to the mayor along with the commissioner's opinion as to the propriety of granting such license, and if the mayor should be satisfied that the applicant was of good character and reputation and was a suitable person to be entrusted with the sale of cigarettes, he should issue the license upon the applicant's filing of a bond conditioned as required in the ordinance.

The applicant there contended "that the ordinance vests arbitrary power in the mayor to grant or refuse a license to sell cigarettes, and that such arbitrary power is a violation of" the Fourteenth Amendment of the Federal Constitution. The court upheld the ordinance and the conviction thereunder and said this, at page 186:

> "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the

invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat,* that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license. "But, assuming that the question may be raised by him, we think the ordinance in question does not violate the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

* * * * * *

"In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the state and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor. Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the state, and, through it, for the city to determine for itself, and that an ordinance providing, reasonable conditions upon the performance of which a license may be granted

to sell such article does not violate any provision of the Federal Constitution."

A reading of the Richmond ordinance together with the Chicago ordinance forces the conclusion that under the authority of the Gundling case, the Richmond ordinance is valid in the same respects.

On page 15 of the appellant's brief her counsel quote from and rely upon *Pictorial Review Co.* v. *City of Alexandria*, 46 F. (2d) 337. This case was decided by a district court in Louisiana in 1930 and has not been cited elsewhere or reviewed by any other court so far as we have been able to learn. In so far as it is intended that the case should apply to the question as to power to require a permit, we think it is overruled by the principles laid down by this court in the Gundling case, *supra;* and in so far as it is intended that it should apply to the commerce question, we believe it to be sufficient to say that it was decided in 1930 and is overruled by the principles established in the Berwind-White Coal Mining Company case, which we discuss hereafter.

As to Point III.

Record is Silent as to Whether or Not An Application for Permit was Ever Made

For the reasons given in the Gundling case, *supra*, under Point II, we submit that the appellant here cannot raise the question as to the requirements for the permit, because the record is silent here as to whether or not she made any application therefor. She is charged with soliciting without a license; she is not charged with failing to procure a permit before soliciting.

(See also *Lehon* v. *Atlanta*, 242 U. S. 53.)

As to Point IV.

Appellant was Not an Employee of the Washington Vendor, and She Solicited for Four Days in Richmond

This point is so closely related to Point V, the two going to the real merits of the case, that we think they can be presented together more satisfactorily than could be done if they were argued separately.

As to Point V.

Richmond's Tax is Levied upon a Taxable Event Which Entirely Transpired within the Jurisdiction of Richmond

This, considered with Point IV, *supra*, brings us to the merits of the objection that the commerce clause is violated. All the way through this case counsel for Dorothy Nippert have presented only one real question and this is based on the commerce clause (R. 2, 24, and Appellant's Brief, 4, 6).

Interstate commerce is not entirely free from taxation. This court has permitted state and local sales taxes to be imposed upon the sale of merchandise through interstate commerce. We refer to those cases which are led by *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33.

The Berwind-White Case

The old views as to the freedom of interstate commerce from local tax burdens were repudiated in 1940 when the court decided the Berwind-White case, *supra*. That case involved the right of the City of New York to

levy a city sales tax upon sales to New York purchasers of coal mined in Pennsylvania by a Pennsylvania corporation under contracts entered into in New York City calling for delivery in New York City. The court upheld the tax, saying that such a tax under those conditions did not impose an invalid regulation or burden upon interstate commerce. The rationale of the case may be fairly and briefly stated to be that the tax was imposed upon events which occurred within the taxing jurisdiction which events are separate and distinct from the transportation or intercourse which is interstate commerce. See 209 U. S. 58, where it is said: "Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption."

The tax in the Berwind-White case was based upon the "delivery" which took place in New York City. The tax here is upon the "solicitation" which took place in Richmond. There is no discrimination here against interstate commerce just as there was none in the Berwind-White case. The two cases are analogous in facts and should be controlled by the same principles of law.

In the case of *Christian Corporation, Petitioner,* v. *Commonwealth of Virginia and the City of Richmond,* 315 U. S. 801, there was a tax very similar to the instant tax, which was imposed upon Christian Corporation for the privilege of engaging in the business of a sales agent in Richmond even when such business as was done by the corporation was the promotion and procurement of sales of merchandise in interstate commerce. The Supreme Court of Appeals of Virginia denied the writ of error to the decision of the Hustings Court of the City of Richmond, sustaining the tax and this court denied a writ of certiorari and both courts have to that extent

approved Richmond's local license tax upon that other business conducted by Christian Corporation in a manner very similar to that engaged in by the appellant, even a flat tax plus a graduated tax based on the volume of business of the previous year.

The only difference between the facts of the Christian case and the facts of the instant case is that in the Christian case the taxpayer had established a definite, regular place of business here, while in this case the taxpayer was proven to have solicited orders for four days in two large retail stores in Richmond. We submit that proof of the fact that the solicitation occurred over a period of four days in the two large mercantile houses in Richmond takes the case outside of the rule of *Robbins* v. *Shelby County, supra,* relied upon by the appellant. The operation for four days constituted doing such business in Richmond as to afford a basis for the tax and we are not attempting to project Richmond's powers beyond her borders. We are asserting the right to tax soliciting when it occurs within the taxing jurisdiction of Richmond and when it is regular, continuous and persistent. As was expressed by Mr. Justice Rutledge, in his dissent in *McLeod* v. *Dilworth Co.,* 322 U. S. 327, 349, 354:

> "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent, is fast losing its force."

Neither the Berwind-White case, nor the denial of the writ of certiorari in the Christian case can hardly be said to be a reaffirmation of the guiding principle and rationale of the Robbins case which was that no tax could be laid as a burden upon interstate commerce. We refer to that portion of the court's opinion in the Robbins case, found in 120 U. S. at page 497, as follows:

> "Interstate commerce cannot be taxed at all, even though same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State."

Chief Justice Hughes in his dissent in the Berwind-White case attempted to convince the majority of the court that the New York sales tax, if held to be valid, would permit various states in an interstate transaction to tax the different elements of the interstate transaction and would thereby permit multiple taxation and put an undue burden upon interstate commerce. He was unsuccessful in his attempt and the majority of the court rejected his views and the true rule is that expressed in the majority opinion, 309 U. S. 33, 47, as follows:

> "Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it."

And again in footnote 2, 309 U. S. 45, as follows:

> "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage."

It is to be noted that both the initial and the ultimate burden of the tax in the instant case is the same and rests solely upon the solicitor, who is an independent

agent within the taxing jurisdiction, and upon her independent acts of soliciting, which transpired in Richmond, and does not in any way rest upon the seller who is outside of the State of Virginia. There is no possibility of multiple taxation upon the solicitation. The only solicitation is that which transpired in Richmond and we assert with respect to the tax here, as this court declared about the New York tax in the Berwind-White case (309 U. S. 48): "Equality is its theme." The Berwind-White case permitted the local tax upon the use of property which had just been moved in interstate commerce. This court should for the same reason approve Richmond's tax upon the solicitation which just precedes the moving of the property in interstate commerce. In the Berwind-White case the court reaffirmed its several holdings to the effect that a fixed sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale was nevertheless valid and it should likewise approve Richmond's fixed sum and graduated tax imposed upon the independent representative of the interstate seller for the privilege of engaging in the business of soliciting orders for the sale of merchandise, even though the merchandise be shipped subsequently in interstate commerce.

The "Jehovah's Witnesses" Case

There is another case relied upon in the appellant's brief (R. 8-9), namely: *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105. The case involves an ordinance of the City of Jeannette, Pennsylvania, imposing a flat tax upon persons canvassing for or soliciting orders for goods, paintings, pictures, wares, or merchandise of any kind. One of "Jehovah's Witnesses" was

arrested and fined. It was proven in evidence that the defendant was doing more than preaching and was doing more than distributing religious literature; that he was doing "a combination of both." The court held the defendant to be immune from the tax, resting the decision upon the fact that it involved "*a flat tax imposed on the exercise of a privilege granted by the Bill of Rights.*" (Italics supplied.)

In the instant case, however, there is no interference with a privilege granted by the Bill of Rights. The only privilege taxed is one that is afforded to all within the state on an absolute equality, but a limited freedom, which is subject to state control,—the freedom to transact the business of soliciting.

Richmond Officers Have No Such View, As Alleged by Appellant, That a Solicitor Can Not Be Taxed

On page 13 of appellant's brief, counsel for appellant have evidently misconstrued and misunderstood the briefs filed in the Christian case, *supra*. It is said there by counsel for appellant that the officials of the city of Richmond, as well as those of the Commonwealth of Virginia, have the "apparent view" that a solicitor would not be required to obtain a local or a state license. The briefs that are referred to are in the files of the clerk of this court, the petition for a writ of certiorari having been denied by this court (315 U. S. 801, No. 812). The excerpt made by counsel for appellant, on page 13 of their brief, is misleading when standing alone. It should be borne in mind that that case involved a state license as a commission merchant, and a city license as a sales agent. It had been alleged that if

Richmond could levy the tax, every other city or town in Virginia might levy the tax.

Section 296 of the Tax Code of Virginia (Acts of Assembly of Virginia, 1928, p. 186) is quoted in page 28 of the petition for the writ of certiorari in that case and provides that in addition to the state tax on any license, the council of a city or town may, when anything for which a license is so required is to be done within the city or town, impose a tax for the privilege of doing the same. Now, the excerpt quoted by opposing counsel becomes clear when we read the whole context, which we quote as follows:

> "While not alleging that any other State may duplicate the challenged taxes, petitioner asserts that by virtue of section 296 of the Tax Code of Virginia (Acts of Assembly 1928, p. 186), it might be subjected to multiple local taxation by each of the cities and towns of the State 'if he undertook to carry on his business in all parts of the Commonwealth as he clearly has a right to do.' (Petitioner's Brief, pp. 28-30.) The record does not show that any other locality in Virginia has taxed petitioner's business, nor is its prediction of potential multiple local taxation supported by section 296 of the Tax Code. This section (quoted in full in petitioner's brief, pp. 28, 29) provides in effect that a city or town may require a license for the carrying on of a business therein where a State license is required for such business. But a State license as a commission merchant is only required where such merchant has established a definite place of business, section 131 of the Tax Code of Virginia (Acts of Assembly 1928, p. 97) providing that 'every license granting authority to engage in * * any business * * shall designate the place of such business * * at some specified house or other definite place within the county or city * *.' There is no State

license required of an itinerant solicitor of orders in a city or town with no place of business therein (such as a drummer) and consequently section 296 of the Tax Code does not afford any authority for the assessment of a local license in such a case. Therefore, since petitioner has no place of business in Virginia except in Richmond (R. 17, 24), no other locality in the State can require it to secure a local license for soliciting orders therein or as a commission merchant under the authority of section 296 of the Tax Code of Virginia. Of course, if petitioner established an office in another city or town in the State, such city or town could impose a license tax on the business of that office, but even then there would be no duplication of tax, for the tax would be measured by the commissions on the business of that office, not including the commissions on the business of the Richmond office. Petitioner's assertion of potential multiple taxation is absolutely without support either in fact or law."

All that was really said there is that section 296 of the Tax Code of Virginia did not authorize a local license in such a case. Richmond, however, had then and has now certain license tax powers other than those given by section 296 of the Tax Code of Virginia. We refer to section 62 of its charter. (Acts of Assembly of Virginia, 1928, pp. 882, 883). Certainly the brief in the Christian case does not justify the statement that it was the view of Richmond's officers that a solicitor would not be required to obtain a license in Richmond.

The Tax Here Is Valid because It Is Levied upon a Local Taxable Event

In all of the recent decisions on the question by this court a local transaction is made the taxable event and that event is separate and distinct from the transporta-

tion or intercourse which is interstate commerce, as was said by Mr. Justice Douglas when he rendered the opinion in the case of the *International Harvester Co.* v. *Department of Treasury of the State of Indiana*, 322 U. S. 340, 346. The contrast between a local taxable event which will support a tax and a taxable event outside of the taxing jurisdiction which will not support the tax is presented in two cases decided by this court in 1944. We refer to *General Trading Co.* v. *State Tax Commissioner of Iowa*, decided May 15, 1944, 322 U. S. 335, and to *McLeod* v. *J. E. Dilworth Co.*, decided the same date, 322 U. S. 327. In the case first referred to the State of Iowa imposed a *use* tax upon a Minnesota corporation upon the basis of property bought from the Minnesota corporation and sent by it from Minnesota to purchasers in Iowa for use and enjoyment in Iowa. The court upheld the tax because it was levied upon the use of the property in Iowa. On the contrary, in the second case referred to, the court held that Arkansas had no power to levy a *sales* tax against Tennessee vendors with respect to sales consumated in Tennessee for the delivery of goods in Arkansas. The court refused to allow Arkansas to impose a tax on a transfer of ownership where the transfer was made beyond the state limits. The court said for Arkansas to impose such a tax on such transactions would be to project its powers beyond its boundaries and to tax an interstate transaction.

We submit that the tax under the Richmond City ordinance now before this court is levied upon a transaction which transpired entirely within the City of Richmond and does not attempt to project Richmond's powers beyond its boundaries. In this connection it is important to again note that Dorothy Nippert was not

an employee of the shipper or vendor (R. 15), and that she was an independent contractor working persistently in Richmond, engaged in business in that City and coming squarely within the local laws.

CONCLUSION

We respectfully submit that again and again this court has laid down such principles as support Richmond's non-discriminatory tax upon an independent agent going about in Richmond's mercantile establishments soliciting for four days and selling to the clerks therein merchandise of an individual non-resident seller, and that she thereby put herself within the taxing jurisdiction of Richmond and that the decision of the lower court is plainly right and should be affirmed.

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Counsel for Appellee

SUPREME COURT OF THE UNITED STATES.

No. 72.—October Term, 1945.

Dorothy Nippert, Appellant, *vs.* City of Richmond. } Appeal from the Supreme Court of Appeals of the State of Virginia.

[February 25, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

The question is whether a license tax laid by an ordinance of the City of Richmond, Virginia, upon engaging in business as solicitor can be applied in the facts of this case consistently with the commerce clause of the Federal Constitution, Article I, § 8. As the case has been made, the issue is substantially whether the long line of so-called "drummer cases"[1] beginning with *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, shall be adhered to in result or shall now be overruled in the light of what attorneys for the city say are recent trends requiring that outcome.

The ordinance lays an annual license tax in the following terms:

> "[Upon] . . .—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors . . . . $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued . . . ."[2]

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[1] See the authorities cited in McGoldrick *v.* Berwind-White Co., 309 U. S. 33, 55-57, and the Court's discussion, particularly in note 11. As there stated, in the *Shelby County* case the Court was cognizant of the rapidly growing tendency of states and municipalities to lay license taxes upon drummers "for the purpose of embarrassing this competition with local merchants," and following the *Shelby County* decision nineteen such taxes were held invalid.

For a discussion of distinction between drummers and peddlers, see Comment, 40 Yale L. J. 1094.

[2] Chapter 10, § 23, Richmond City Code (1939).

Chapter 10, § 166½(a) reads: "Every person, firm and corporation desiring a license under sections 14, 16, 23, 94, 120 and 143 of this chapter shall first apply to the Director of Public Safety for a permit on behalf of said individual, firm or corporation, as the case may be, to conduct the business which is desired to be conducted and shall produce to that Director evidence of the good character of the individual, the members of the firm, or the chief officers of the corporation, as the case may be, and it shall thereupon be the duty of the Director of Public Safety to make a reasonable in-

Appellant was arrested in Richmond for having engaged in the business of a solicitor there without previously procuring the required license. After hearing before a police court justice she was fined $25.00 and costs and ordered to secure a license. An appeal was noted to the Hustings Court of the City of Richmond, where a trial de novo was had upon the agreed statement of facts set forth in the margin.[3] The Hustings Court held the ordinance applicable to appellant in the circumstances disclosed by the facts and was of the opinion that, so applied, it was not in conflict with the commerce clause. Accordingly the court found

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vestigation of the character of said individual, each of the members of the firm, or each of the chief officers of the corporation, as the case may be, and if he be satisfied that the individual, the members of the firm or the principal officers of the corporation, as the case may be, be of good moral character and a person or persons fit to engage in the proposed business, he shall issue the permit. The form of the application for such permit and the form of the permit itself shall be prepared and furnished by the Director of Public Safety."

Appellant has argued in this Court that the ordinance's requirements relating to permits, particularly in so far as they may vest in the Director of Public Safety discretionary power to grant or withhold the permit, of their own force and without reference to the character of the tax in other respects render it invalid in the present application. Appellee insists that the point was not presented in the state courts and therefore is not open for consideration here. In view of the disposition we make of the cause on other grounds, it is not necessary to consider these questions.

[3] "The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from City to City throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C. O. D. for the balance to the purchaser. The solicitors at no time make a delivery of the article.

"The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

"The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not there[to]fore procured a City revenue license from the City of Richmond."

the appellant guilty and fined her five dollars and costs. The Supreme Court of Appeals of Virginia affirmed. 183 Va. 689. From that judgment of the state's highest court the case comes here by appeal.

If the matter is to be settled solely on the basis of authority, nothing more is required than bare reference to the long list of drummer decisions, which have held unvaryingly that such a tax as Richmond has exacted cannot be applied constitutionally to situations identical with or substantially similar to the facts of this case. Among the latest of these is *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, in which a municipal ordinance requiring solicitors to pay a license fee was held unconstitutional as a forbidden burden upon interstate commerce when applied to an out-of-state corporation whose representatives solicited orders for subsequent interstate shipment. Cf. *Best & Co.* v. *Maxwell*, 311 U. S. 454.

Counsel for Richmond, however, insist that other cases decided here have seriously impaired the "drummer" line of authority, so much so that those rulings no longer can stand consistently with the later ones. Their principal reliance is on *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, in which the Court sustained the application of New York City's sales tax to the delivery there, at the end of its interstate journey, of coal shipped from Pennsylvania pursuant to contracts of sale previously made in New York.[4] It is urged that the case is indistinguishable from the present one on any tenable basis relating to the bearing or effect of the tax upon interstate commerce, although the opinion reviewed at some length the drummer cases, among others, and expressly distinguished them.[5]

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[4] Some reliance appears to be placed also upon other more recent cases, including International Harvester Co. v. Department of Treasury of Indiana, 322 U. S. 340, and General Trading Co. v. State Tax Commission of Iowa, 322 U. S. 335.

[5] Pointing out, with a reference to the *Shelby County* case itself, that in some of the cases the tax appeared to be aimed at the suppression of this type of business or putting it at disadvantage with competing intrastate sales, the opinion continued:

"In all [the cited cases], the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a state, in some circumstances, may by taxation suppress or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed, . . . it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute.

Unless therefore this latest pronouncement upon their continuing authority is to be put aside with the cases themselves, the application made of the ordinance in this case must be stricken down. For the tax thus laid is precisely the "fixed sum license tax imposed on the business of soliciting orders for the purchase of goods to be shipped interstate" which the *Berwind-White* opinion distinguished from the New York tax.[6]

But we are told that the rationale of the decision requires the distinction to be discarded. As counsel state it, this was "that the tax was imposed upon events which occurred within the taxing jurisdiction which events are separate and distinct from the transportation or intercourse which is interstate commerce."[7] The logic is completed by noting that the New York tax was upon the "local incident" of "delivery" while in this case it is on the like incident of "solicitation"; and by adding the contention, given more substance since the argument by our decision in *International Shoe Co.* v. *Washington*, No. 107, decided December 3, 1945, that "mere solicitation" when it is regular, continuous and persistent, rather than merely casual, constitutes "doing business," contrary to formerly prevailing notions. Hence it is concluded, since the delivery in the *Berwind-White* case could be taxed, so can the solicitation in this case.

. . . It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing District, supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate . . . ; and that the actual and potential effect on the commerce of such a tax is wholly wanting in the present case." 309 U. S. at 56-57. In Best & Co. v. Maxwell the Court said: "In McGoldrick v. Berwind-White Co. . . . we pointed out that the line of decisions following Robbins v. Shelby County . . . rested on the actual and potential discrimination inherent in certain fixed-sum license taxes." 311 U. S. 454, 455, note 3.

[6] See note 5. Whether or not the "fixed sum" reference would apply to a tax measured in part by gross receipts (cf. the language of the ordinance in this case relating to earnings, etc., in excess of $1000), the tax as applied here presumably would not involve that feature, since by the explicit wording it applies only to earnings, etc., "for the preceding license year" and there is no showing relating to such earnings in this case. See also note 7.

[7] Counsel cite the Court's statement made in differentiating Adams Mfg. Co. v. Storen, 304 U. S. 307, 311: "The rationale of the Adams Manufacturing Co. case does not call for condemnation of the present tax. Here the tax *is conditioned upon a local activity*, delivery of goods within the state upon their purchase for consumption." 309 U. S. at 58. (Emphasis added.) However, the Court went on immediately to say, "It is an activity which, apart from its effect on the commerce, is subject to the taxing power. The effect of the tax, even though measured by the sales price [cf. note 6 *supra*], as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce." *Ibid.*

Appellee's rationalization takes only partial account of the reasoning and policy underlying the *Berwind-White* decision and its differentiation of the drummer authorities. If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from "the transportation or intercourse which is" the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves "incidents" occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local," and thus achieve its desired result.

It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable "local incident" may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax.[8] But beyond the presence of a sufficient connection in a due process or "jurisdictional" sense, whether or not a "local incident" related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.[9] Some of these at least were emphasized in the *Berwind-White* opinion.

[8] The latest instance decided here being McLeod *v.* Dilworth Co., 322 U. S. 327.

[9] It is old doctrine, notwithstanding many early deviations, that the practical operation of the tax, actual or potential, rather than its descriptive label or formal character is determinative. See the authorities cited in note

Thus the Court, referring to the *Shelby County* line of decisions, stressed that "read in their proper historical setting, these cases may be said to support the view that this kind of a tax is likely to be used 'as an instrument of discrimination against interstate or foreign commerce . . . .'"[10] and that the tax "in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state."[11] Noting that the state in some instances can suppress or curtail one kind of local business for the advantage of another type of competing business, the opinion denied that interstate commerce "may be similarly affected by the practical operation of a state taxing statute," and also denied that the New York tax had any such actual or potential effect.

Thus the essence of the distinction taken in the *Berwind-White* case was that the taxes outlawed in the drummer cases in their practical operation worked discriminatorily against interstate commerce to impose upon it a burden, either in fact or by the very threat of its incidence, which they did not place upon competing local business and which the New York sales tax did not create.[12] See *Best & Co.* v. *Maxwell*, 311 U. S. 454; cf. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359.

As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden.[13] For, though "interstate commerce must pay its way,"[14] a state consistently with the commerce clause cannot put a barrier around its borders to bar out trade from other states and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power "To regulate Commerce with foreign Nations, and among

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23. The *Berwind-White* and other recent cases, including Best & Co. v. Maxwell, 311 U. S. 454, only bring that doctrine down to date. Cf. Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617, 621.

[10] 309 U. S. at 56, note 11; see note 5, *supra.*

[11] See note 6.

[12] See Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617, 621.

[13] Cf. Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, 259; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254; McGoldrick v. Berwind-White Co., 309 U. S. 33, 46; Nelson v. Sears, Roebuck & Co., 312 U. S. 359.

[14] Postal Telegraph Cable Co. v. Richmond, 249 U. S. 252, 259; New Jersey Bell Telephone Co. v. State Board of Taxes, 280 U. S. 338, 351.

the several States . . . ."[15] Nor may the prohibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect.[16]

Appellee argues, as the Virginia Supreme Court of Appeals held,[17] that the Richmond tax is not discriminatory or unduly burdensome in effect. In support of this view it relies mainly on two contentions, first, that the tax is no more discriminatory or burdensome than was the tax in the *Berwind-White* case; and, second, that it applies alike to all solicitors whether they are engaged in soliciting for local or for interstate business. Apart from the fact that the tax as applied here is laid directly upon sales arising only under contracts requiring interstate shipment of goods, cf. 309 U. S. 48 ff, the contentions entirely misconceive what is meant by discrimination or undue burden in the sense applicable to these problems.

In view of the ruling in *International Shoe Co.* v. *Washington*, *supra*, we put aside any suggestion that "solicitation," when conducted regularly and continuously within the state, so as to constitute a course of business, may not be "doing business" just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable. But we do not think the tax as it was applied in this case either conforms to those conditions of regularity and continuity or avoids other prohibited effects.

The sales and the deliveries in the *Berwind-White* case were regular, continuous and persistent. They constituted a "course of business." There was no suggestion, nor any basis in the facts for one, that they were only casual, spasmodic or irregular.

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[15] Walling *v.* Michigan, 116 U. S. 446, 455-458. Thus, even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the states the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the state's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic, United States *v.* Frankfort Distilleries, 324 U. S. 293, whether or not also in some instances in addition to complete exclusion from passing through the state, Collins *v.* Yosemite Park Co., 304 U. S. 518, in the absence of such congressional action. Cf. Carter *v.* Virginia, 321 U. S. 131, 137; Ziffrin *v.* Reeves, 308 U. S. 132, 140.

[16] Cf. Western Live Stock *v.* Bureau of Revenue, 303 U. S. 250, 256; Baldwin *v.* G. A. F. Seelig, 294 U. S. 511, 522-523; Best & Co. *v.* Maxwell, 311 U. S. 454, 455, and authorities cited in note 3 therein.

[17] See, in addition to the instant case, Dunston *v.* Norfolk, 177 Va. 689.

On the present record the only showing is that appellant "on January 20, 1944, was soliciting orders" in Richmond, for later out-of-state confirmation and fulfillment, and that for four days prior to that date she had been engaged in such solicitation "from place to place in the City of Richmond," including particularly solicitation of the clerks in the department store of Miller & Rhoads, Incorporated, and in a five and ten cent store. There was no showing that, apart from these five days, appellant had solicited previously in Richmond, that she intended to return later for the same purpose or, if so, whether regularly and indefinitely or only occasionally and spasmodically.

This difference in the facts would be sufficient in itself to distinguish the cases. But there are other differences. The tax here was a fixed substantial sum for the first year, to which in subsequent years would be added one-half of one per cent of the gross returns in excess of $1000. And, regardless of the discretionary element in the issuing function of the Director of Public Safety, his permit was required with payment of the tax before the license could issue or the act of solicitation could lawfully take place, criminal sanction being prescribed for violation. So far as appears a single act of unlicensed solicitation would bring the sanction into play. The tax thus inherently bore no relation to the volume of business done or of returns from it. The New York sales tax, on the other hand, was limited to a percentage of the gross returns, being thus directly proportioned to the volume of business transacted and of returns from it. Although the seller was put under duty to pay the tax within a specified time from the sale, he was not required to obtain a permit or license beforehand in order to initiate or complete the transaction. Moreover the economic incidence of the tax fell only upon completed transactions, not as in this case on the very initial step toward bringing one about.

Obviously different therefore are the two taxes, first, in their exclusionary effects, especially upon small out-of-state operators, whether casual or regular; and also, it would seem clear, in discriminatory effects as between such operators and local ones of the same type or other competing local merchants. The New York tax bore equally upon all, whether local or out-of-state and whether making a single sale or casual ones or engaging continuously in them throughout the year. As the Court said, it is diffi-

cult to see how the New York tax could bear in any case more heavily upon out-of-state operators than upon local ones, apart from possible multiple state taxation or the threat of it such as, among other considerations,[18] was thought to forbid the levy and collection of the tax in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. The incidence of the tax was the same upon both types of transactions, as was its amount; and if in any instance there was exclusionary effect or tendency, this did not appear from the record or from the inherent character of the tax. Neither did any possibility appear that it would strike more heavily upon out-of-state sellers than on local ones, apart from that of multiple state taxation.[19]

In addition to that possibility, the Richmond tax imposes substantial excluding and discriminatory effects of its own. As has been said, the small operator particularly and more especially the casual or occasional one from out of the state will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun. And this effect will be extended to more substantial and regular operators, particularly those whose product is of highly limited or special character and whose market in any single locality for that reason or others cannot be mined more than once in every so often.[20]

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[18] The Court said: "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce." 304 U. S. at 311-312.

[19] It should be noted that no question has been raised in this case concerning any issue of so-called "multiple state taxation." Cf. note 7. But if a nondiscriminatory state tax may become discriminatory or unduly burdensome by virtue of the fact that other states also may impose a similar tax bearing upon the transaction, the possibilities for such multiplication would seem obviously to be magnified many times by the application of municipal taxes like that involved here.

[20] The established merchant maintaining a local place of business where he deals in a variety of commodities, for instance, is much more favorably placed to absorb the cost of the tax than the itinerant vendor who deals in or takes orders for a single specialized commodity or only a few.

The record does not show whether appellant would have been compensated by the company for whom she solicits, had she paid the tax.

The potential excluding effects for itinerant salesmen become more apparent when the consequences of increasing the amount of the tax are considered. Cf. *McGoldrick* v. *Berwind White Co.*, *supra*, at 58. And they are magnified many times by recalling that the tax is a municipal tax, not one imposed by the state legislature for uniform application throughout the state.

It is true that in legal theory the municipality exercises by delegation the state's legislative power and that prior decisions here have not rested squarely upon any difference between a tax municipally imposed and one laid by the legislature. But the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of state-wide application likely to be laid by the legislature itself. And it is almost as obvious that the cumulative burden will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the state or the salesman who operates within a single community or only a few.[21] The drummer or salesman whose business requires him to move from place to place, exhausting his market at each periodic visit or conducting his business in more sporadic fashion with reference to particular localities, would find the cumulative burden of the Richmond type of tax eating away all possible return from his selling. A day here, a day there, five days now and five days a year or several months later, with a flat license tax annually imposed lacking any proportion to the number or length of visits or the volume of the business or

[21] The discriminations against solicitors constitute only part of the more general problem of interstate trade barriers. See Hearings before the Temporary National Economic Committee, 76th Cong., 2nd Sess., Pt. 29; Melder, State and Local Barriers to Interstate Commerce in the United States (1937). But as to the different types of statutes and ordinances designed to favor local business as against itinerant solicitors and peddlers and "gypsy truckers," see Hearings, *supra*, 15965-15987 and Exhibit No. 2394 (not included in the printed Hearings); Gould, Legislative Intervention in the Conflict between Orthodox and Direct-Selling Distribution Channels (1941) 8 Law & Contemp. Prob. 319. One method used to discourage solicitors has been to require elaborate information. It is said that "In some New Jersey cities this method has reduced the number of canvassers by 35 per cent." 18 Public Management 83. And in Arizona at one time an itinerant trucker, who went through all the counties of the state, would have been obliged to pay $4,400 in fees in addition to posting a $5,000 bond. Hearings, *supra*, Ex. 2353. In addition, licensing statutes, otherwise fair on their face, are said to have been discriminatorily enforced against itinerant merchants. See Note (1940) 16 Ind. L. J. 247, 251.

return can only mean the stoppage of a large amount of commerce which would be carried on either in the absence of the tax or under the incidence of one taking account of these variations.

These effects, not present in the *Berwind-White* type of tax,[22] are inherent in the Richmond type in relation to a wide variety of selling activities. They are not only prohibitive in an absolute sense, for many applications. They are discriminatory in favor of the local merchant as against the out-of-state one.

It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern.[23] To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position.

The tax, by reason of those variations, cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between those two classes of commerce, generally speaking, impossible.

It is true that the tax may strike as heavily upon some Virginia solicitors, and even upon some who confine themselves to Richmond, as it does upon others who come periodically or otherwise

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[22] The *Berwind-White* case furnishes an illustration that the difference between municipal and statewide taxes may not be controlling or even relevant in relation to a tax which, apart from the possibility of multiple state taxation, presents neither the prohibitive consequences inherent in Richmond's tax nor any element of discrimination in favor of local business. The itinerant out-of-state merchant could pay the New York sales tax and survive, according to its general effect, without any disadvantage as compared with local merchants, itinerant or established, resulting from the tax excepting only the possibility of multiple state taxation.

[23] Cf. Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 224, 227; Lawrence *v.* State Tax Commission, 286 U. S. 276, 280; Southern Pacific Co. *v.* Gallagher, 306 U. S. 167, 177; Wisconsin *v.* J. C. Penny Co., 311 U. S. 435, 444, 445; Nelson *v.* Sears, Roebuck &Co., 312 U. S. 359, 363, 366.

from Washington, New York or Cedar Rapids. And it may bear upon a few of the former more heavily than upon most of the latter. But neither consequence is the more probable one for the larger number of cases. The strong likelihood is the other way. And to point to either of those possibilities is only to say, in a different way, that the tax is highly variable in its incidence and effects with reference to the manner in which one organizes his business and especially in respect to its location and spread in relation to state lines. It was exactly these variations, when they bear with undue burden upon commerce that crosses state lines, which the commerce clause was intended to prevent.

We are not unmindful that large enterprise which "does business" by sending solicitors regularly and continuously into several states, cf. *International Shoe Co.* v. *Washington, supra*, may have the financial resources and established course of business enabling it to absorb the tax and justifying its doing so in an economic sense; or that, therefore, if the ruling should extend to such a situation, the business so situated would escape to that extent bearing the burden of the tax borne by local businesses similarly situated, absent some other form of tax to equalize the burden. But, in the first place, no such case is presented by the facts here.[24] And even if such a result should be thought necessary in order to avoid the forbidden consequences in so many other applications, that fact would not justify sustaining the tax and permitting those consequences to occur.

There is no lack of power in the state or its municipalities to see that interstate commerce bears with local trade its fair share

[24] Since appellant works for an out-of-state firm and the record contains nothing to show her presence in Richmond at any time other than during the one five-day period, or any intention to return, whether periodically or casually, no presumption can arise that she was a resident of Richmond or was regularly engaged in solicitation there. The presumption on the facts before us is the other way.

Moreover, here as in Best & Co. v. Maxwell, 311 U. S. 454, the "real competitors" of petitioner are, among others, the local retail merchants. The Richmond ordinance, unlike the North Carolina statute, does not discriminate on its face between such merchants and transient solicitors; nor does it fix a lower rate for the former. But the opinion in the *Best* case expressly pointed out that nominally the statute treated local and out-of-state transients alike. Nevertheless, since the latters' principal competition obviously came from "regular retail merchants" and the tax bore "no relation to actual or probable sales," the Court found the North Carolina atmosphere too hostile to allow survival of interstate commerce. The discrimination resulting from the present application of the Richmond ordinance, as between out-of-state solicitors and regular retail merchants, is only less obvious. It is not less real. Cf. note 5.

of the cost of local government, more especially in view of recent trends in this field. *McGoldrick* v. *Berwind-White Co., supra.* But this does not mean, and the trends do not signify, that the state or municipal governments may devise a tax applicable to all commerce alike, which strikes down or discriminates against large volumes of that commerce in order to reach other portions as to which the application of the tax would produce no such consequences or only negligible ones. Other types of tax are available for reaching both portions which do not involve the forbidden evils or the necessity for putting them upon some commerce in order to reach other. The problem comes down therefore to whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause and puts that commerce actually upon a plane of equality with local trade in local taxation, not as is said to a question of whether interstate trade shall bear its fair share of the cost of local government, the benefit and protection of which it enjoys on a par with local business.

The tax here in question inherently involves too many probabilities, and we think actualities, for exclusion[25] of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one. Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, we cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against. It may be, as the Court said in the *Berwind-White* case, that the state is free to allow its municipal subdivisions to erect such barriers against each other, to some extent, as to the com-

[25] Obviously a total exclusion of commerce is itself the most effective form of discrimination in favor of the local merchant who is so situated that he can continue in the business.

merce over which the state has exclusive control. It cannot so outlaw or burden the commerce of the United States.

The drummer is a figure representative of a by-gone day.[26] But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify.

We have considered appellee's other contentions and find them without merit.

The judgment is

Reversed.

Mr. Justice BLACK dissents.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[26] See, for the part played by itinerants in our history, Wright, Hawkers and Walkers in Early America (1927). Peddlers were discriminated against in favor of town merchants as early as 1700. Wright, *supra*, at 90.

SUPREME COURT OF THE UNITED STATES.

No. 72.—October Term, 1945.

Dorothy Nippert, Appellant, *vs.* City of Richmond.	Appeal from the Supreme Court of Appeals of the State of Virginia.

[February 25, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Murphy concurs, dissenting.

The Court has not shared the doubts which some of us have had concerning the propriety of the judiciary acting to nullify state legislation on the ground that it burdens interstate commerce. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 784, 795, dissenting opinions. But the policy of the Court is firmly established to the contrary.

Even in that view, however, this judgment should not be reversed. The Court has held drummer taxes unconstitutional where they were discriminatory on their face or where it appeared that necessarily or in practical operation they worked to the disadvantage of interstate commerce. See *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 45-46, note 2. But the present ordinance on its face seems to reflect no more than a *bona fide* effort to make interstate commerce pay its way. *Western Live Stock Co.* v. *Bureau*, 303 U. S. 250, 254. It treats a solicitor for a Virginia manufacturer exactly the same as it treats solicitors for manufacturers located in other States. Under this type of tax, the solicitor for a Virginia manufacturer pays as much as Nippert, whether he confines himself to one locality or works his way through the State.

In that view a grant of immunity to Nippert is the grant of a preference to interstate commerce.

The problem, however, does not end there. *Best & Co.* v. *Maxwell*, 311 U. S. 454. In that case, a North Carolina tax on those who displayed goods in any hotel room or temporary office in order to obtain retail orders was applicable to solicitors representing local as well as out-of-state distributors. We held that that parity of treatment did not save the tax. We said that the tax must be compared with the tax on the local retail merchants—the "real competitors" of the out-of-state solicitor. Find-

ing that the tax on the local retail merchants was lighter, we held that the tax discriminated against the out-of-state solicitor and was therefore invalid.

In the present case the tax on Nippert may or may not, in practical operation, work to the disadvantage of this interstate business. It would be one thing if Nippert's business took her from town to town throughout the State. But so far as we know, Nippert may be a resident of Richmond working exclusively there, full or part time. In that event, we could not determine the issue of discrimination without knowing what taxes the retail merchants in Richmond must pay. If the facts were known, it might appear that the tax, now struck down, in fact resulted in parity of treatment between Nippert and her local competitors. The record does not enlighten us on any of these matters.

I think that one who complains that a state tax, though not discriminatory on its face, discriminates against interstate commerce in its actual operation should be required to come forward with proof to sustain the charge. See *Southern Railway Co.* v. *King*, 217 U. S. 524, 534-537. This does not, of course, require proof of the obvious. But as Mr. Justice Brandeis pointed out, cases of this type should not be decided on the basis of speculation; the special facts and circumstances will often be decisive. *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 170-172. Without evidence and findings we frequently can have no "sure basis" for the informed judgment that is necessary for decision. *Terminal Railroad Assoc.* v. *Brotherhood*, 318 U. S. 1, 8. That seems to me to be the case here. Proof should be required to overcome the presumptive validity of this local legislation as applied to Nippert.